The Honorable Noel L. Hillman

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UNITED STATES
DISTRICT COURT

# THE UNITED STATES DISTRICT COURT
# DISTRICT OF NEW JERSEY

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| IN RE: Pet Food Products Liability Litigations | ) | Civil Action No. 07-2867 (NLH) |
| | ) | MDL DOCKET NO. 1850 |
| | ) | |
| | ) | OBJECTION TO PET FOOD EVIDENCE DISPOSAL PLAN APPROVED ON DECEMBER 18, 2007 |

## 1. INTRODUCTION

COMES NOW, Donald R. Earl, a party in interest in evidence subject to this Court's order of December 18, 2007, docket number 106, said evidence described as "unorganized product", and hereby objects to the wholesale destruction of said evidence.

## 2. ISSUE

Should pet food evidence, described as "unorganized product", which is material to, or likely to be material to, civil cases or investigations pending in other jurisdictions or venues, be subject to wholesale destruction by order of this Court?

## 3. BACKGROUND

Earl is one among many pet owners that believing their pets had been poisoned by

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adulterated pet food, submitted pet food samples to private forensic laboratories for independent analysis at their own expense.

Numerous samples of independently tested pet food, not subject to the Menu Foods' recall of March 2007, tested positive for acetaminophen, most often in the presence of cyanuric acid, including those samples submitted by Earl. Additionally, at least one sample of pet food, which was subject to the recall, tested positive for acetaminophen in addition to melamine.

Both cyanuric acid and melamine are sources of non-protein nitrogen, which may be used to artificially boost the apparent protein content of food. Both substances by themselves are virtually nontoxic. Cyanuric acid is FDA approved for use as a source of non-protein nitrogen in ruminant feed in the U.S.. Neither substance is approved for use in human or pet food, as non-ruminants are unable to utilize sources of non-protein nitrogen.

In a recent U.C. Davis study, it was shown that in sufficient quantities, a combination of cyanuric acid and melamine is lethal to pet cats. In relation to the March 2007 recall, no source of significant quantities of cyanuric acid has been identified. While trace amounts typically associated with the production of melamine have been found in connection with the melamine contamination, nothing on the order of a source capable of producing the 50/50 mixture of the two substances, which was used in the U.C. Davis study, has been identified.

Available evidence indicates Menu Foods, and/or one or more of its suppliers, was illegally adding cyanuric acid to pet food, and/or ingredients used in pet food, to create a fraudulent apparent protein analysis of the pet food and/or its ingredients. It is presently assumed the cyanuric acid used for this purpose was cross contaminated with acetaminophen, which is extraordinarily toxic to pet cats.

As Earl is not a putative member of the class of plaintiffs, as defined by the Judicial Panel's order of June 19, 2007, Earl filed an individual action against Menu Foods and The Kroger Company in superior court, in Jefferson County, Washington. The evidence subject to this Court's order of December 18, 2007, which is described as "unorganized product" or "banana box material", is, or potentially could be, material to Earl's pending civil case in Washington State.

Additionally, Earl is aware of at least one other pending class action, as well as a criminal investigation being conducted by the U.S. Attorney's Office, to which the evidence described as "unorganized product" may be material.

The Defendants' in the action before this Court are highly motivated to destroy as much evidence as possible, to limit liability outside the recall period, as well as to avoid possible criminal prosecution for violations of the Food, Drug and Cosmetics Act.

The Plaintiffs' in the action before this Court have no motivation to preserve evidence not immediately material to their own case.

Menu Foods, Kroger and other Defendants, which are parties to the action before this Court, knew, or reasonably should have known, that persons or entities not a party to this action are likely to have a material interest in preserving evidence not immediately related to this case. Yet, no effort was made to notify those persons or entities that negotiations were taking place related to the destruction of that evidence. Those persons or entities were not invited to take part in those negotiations. And, no notice was given to those persons or entities as to the outcome of those negotiations and the Court's subsequent order. In fact, it was not until January 14, 2007 that Earl was first made aware by counsel for Menu Foods that such an order had been entered.

## 4. ARGUMENT

On viewing the text of relevant documents filed in this Court, a mental image of vast mountains of rotting pet food, swarming with unnamed - yet no less dark for the lack of naming - vermin, is created. Yet, one might reasonably assume this darkly menacing threat to the public health would have become a problem long before the eclipse on nearly a year's time - more on the order of a few weeks, if the threat were real, rather than 10 months. The vague allusions to the product being swept up and shipped with mountains of garbage are also difficult to credit. Shipping garbage cross country is far less cost effective than simply disposing of it properly, and, virtually all of the entities doing the shipping are required by law to keep their premises sanitary. It is also reasonable to assume the pet food companies, knowing they would be receiving open and/or damaged containers of pet food products, and being themselves subject to regulations of a sanitary nature, would take reasonable care to avoid the type of situation described in the filings, by segregating those components of the returned product likely to create problems. The vast bulk of the so called "unorganized product" is, or reasonably should be, intact and in containers designed to preserve the food for on the order of at least three years.

Also, one might reasonably question the motivation to "organize" some part of the returned product, while creating an "unorganized" body of evidence slated for disposal. One might reasonably infer that with 10 months to organize, the most incriminating evidence would be that earmarked for destruction. By the Defendants' own admission, entire days worth of evidence are missing from the so called "organized product". They argue they might not find it by checking the "unorganized product". However, unless some part of that evidence has been intentionally destroyed, it logically may be found among the body of evidence known as "unorganized product".

From the documents filed in this Court, it appears the estimated cost to organize the so called "unorganized product" is based on a wage rate of $13.50 per hour, where minimum wage is the typical going rate for inventory counters. Counting inventory is a yearly practice for virtually every business in the nation and the procedures for doing so are swift and efficient. The Defendants' estimated time and cost to organize unorganized product appears to be grossly exaggerated.

While it is understandable the Defendants find the storage of evidence burdensome, it should be remembered it was the Defendants' own lack of care which created the burden in the first place. It is also important to point out the Defendants themselves aggressively solicited the return of evidence held by pet owners, without ever informing those pet owners the $2 worth of pet food they held might be the only evidence they would have available to prove a claim for damages. As the Defendants solicited custody of the evidence, the responsibility to maintain that evidence is inherent in the solicitation.

Above all else, once that evidence is destroyed, it is gone forever; no matter how badly needed it may be at a later date in pending litigation and investigations, or potential future litigation and investigations.

## 5. RELIEF SOUGHT

For the above reasons, Earl respectfully prays the Court:

a) Prevent the Defendants from destroying evidence until such time as all persons or entities with a material interest in the preservation of the evidence are notified.

b) Allow those persons or entities with a material interest in the preservation of the evidence to take part in negotiations related to its disposition.

c) As a result of notification and negotiations, adopt a plan which protects the interests of persons and entities, that while not party to the action before this Court, never the less have a material interest in the preservation of evidence subject to this Court's orders.

Dated January 22, 2008:

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604